

AMENDED IN ASSEMBLY APRIL 28, 2008

AMENDED IN ASSEMBLY MARCH 28, 2008

CALIFORNIA LEGISLATURE—2007–08 REGULAR SESSION

ASSEMBLY BILL

No. 2359

Introduced by Assembly Member Jones

February 21, 2008

An act to amend Section 2953 of the Civil Code, to amend Section 1281 of the Code of Civil Procedure, and to repeal and add Section 4979.8 of the Financial Code, relating to loans.

LEGISLATIVE COUNSEL'S DIGEST

AB 2359, as amended, Jones. Loans.

(1) Existing law regulates the process of ~~foreclosing~~ *foreclosure* on real property subject to a mortgage or deed of trust. Existing law provides that any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by any instrument creating a lien on real property, whereby the borrower agrees to waive specified rights or privileges conferred upon him or her, shall be void. Existing law excepts from these provisions any deed of trust, mortgage, or other liens given to secure the payment of bonds or other indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utility, as specified.

This bill would prohibit a broker, trustee, or mortgagee, or his or her agent, beneficiary, or ~~assign~~ *assigns* from requiring as a condition of an agreement regarding a high-cost loan, subprime loan, or nontraditional mortgage, as defined, that a borrower or an applicant for the loan waive any rights, remedies, obligations, or procedures of

California law with respect to a residential mortgage or mortgage foreclosure.

This bill would also prohibit a broker, trustee, or mortgagee, or his or her agent, beneficiary, or ~~assign~~ *assigns* from refusing to enter into an agreement with a borrower or an applicant regarding a high-cost loan, subprime loan, or nontraditional mortgage solely because he or she refuses to waive rights, remedies, obligations, or procedures provided for in those provisions. The bill would also provide that the exercise by a borrower or applicant of the right to refuse to waive legal rights, remedies, obligations, or procedures, including a rejection of an agreement to arbitrate, shall not affect any other term of the agreement. This bill would also place on the broker, trustee, or mortgagee or his or her agent, beneficiary, or assigns, the burden of proving that any waiver of rights, remedies, obligations, or procedures of California law with respect to these loans, including any agreement to arbitrate a claim or dispute, was knowingly and voluntarily made by the borrower or applicant and was not a condition of the agreement. This provision would apply to an agreement to waive any rights, remedies, obligations, and procedures of California law with respect to those loans, including an agreement to arbitrate, that is entered into, altered, modified, renewed, or extended on or after January 1, 2009.

(2) Under existing law, a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, except upon those grounds that exist for the revocation of any contract.

This bill would specify that provision would not apply to any arbitration agreement that is involuntary, unconscionable, against public policy, or otherwise unenforceable.

(3) Existing law imposes certain limitations and prohibitions on licensed persons, including real estate brokers, finance lenders, residential mortgage lenders, and financial institutions, with respect to consumer loans and covered loans, as defined. Existing law exempts an assignee that is a holder in due course from liability under these provisions regulating consumer and covered loans. Existing law exempts persons chartered by Congress to engage in the secondary mortgage market from the provisions regulating consumer and covered loans.

This bill would delete that exemption from liability for an assignee that is a holder in due course and the exemption for persons chartered by Congress to engage in the secondary mortgage market. The bill would instead make any ~~subsequent holder~~ *purchaser* or assignee of a

high-cost loan, ~~subprime loan, or nontraditional mortgage~~ subject to all affirmative claims and any defenses with respect to the loan that the consumer could assert against the *original* creditor, ~~as defined, who originated or broker of the loan, except as specified. The bill would also authorize a borrower to assert certain claims to reduce or extinguish the borrower's liability under a high-cost loan within specified timeframes against a creditor, subsequent holder, or assignee of the loan.~~

(4) This bill would also make other conforming, nonsubstantive, technical changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares that it is the
2 public policy of the State of California to ensure that homeowners
3 and prospective home buyers have the full benefit of the rights,
4 remedies, obligations, and procedures of California law with
5 respect to agreements regarding high-cost loans, subprime loans,
6 and nontraditional mortgages, and that homeowners and applicants
7 for those loans shall not be deprived of those rights, remedies,
8 obligations, or procedures by the use of coerced and involuntary
9 waivers. It is the purpose of this act to ensure that any agreement
10 between (a) a broker, trustee, or mortgagee or their agents,
11 beneficiaries, or assigns and (b) a borrower or applicant for a loan
12 that purports to waive any rights, remedies, obligations, or
13 procedures under California law regarding a high-cost loan,
14 subprime loan, or nontraditional mortgage is a matter of voluntary
15 consent and not coercion.

16 The Legislature finds and declares that involuntary contractual
17 waiver provisions with respect to a high-cost loan, subprime loan,
18 or nontraditional mortgage, including, but not limited to, an
19 agreement to arbitrate a dispute, that limit or purport to limit a
20 borrower's or applicant's access to any administrative complaint
21 or dispute resolution procedure of the State of California or any
22 other public agency, including, but not limited to, the right to file
23 and pursue a complaint against a licensed person or entity, to file
24 and pursue a civil action, or to limit the authority of the State of
25 California or other public agency to investigate and pursue claims

1 alleging violation of law or regulations, imposed as a condition of
2 a loan, are against the public policy of this state.

3 SEC. 2. Section 2953 of the Civil Code is amended to read:

4 2953. (a) Any express agreement made or entered into by a
5 borrower at the time of or in connection with the making of or
6 renewing of any loan secured by a deed of trust, mortgage, or other
7 instrument creating a lien on real property, whereby the borrower
8 agrees to waive the rights, or privileges conferred upon him or her
9 by Sections 2924, 2924b, 2924c of the Civil Code or by Sections
10 580a or 726 of the Code of Civil Procedure, shall be void. The
11 provisions of this section shall not apply to any deed of trust,
12 mortgage, or other liens given to secure the payment of bonds or
13 other evidences of indebtedness authorized or permitted to be
14 issued by the Commissioner of Corporations or made by a public
15 utility subject to the provisions of the Public Utilities Act.

16 (b) A broker, trustee, or mortgagee, or his or her agent,
17 beneficiary, or ~~assign~~ *assigns* shall not require as a condition of
18 an agreement regarding a high-cost loan, subprime loan, or
19 nontraditional mortgage that a borrower or an applicant for the
20 loan waive any rights, remedies, obligations, or procedures of
21 California law with respect to a residential mortgage or mortgage
22 foreclosure, including, but not limited to, the right to file and pursue
23 an administrative complaint or invoke a dispute resolution
24 procedure of the state or any other public agency, the right to file
25 and pursue an administrative complaint or other proceeding against
26 a licensed person or entity, or to file and pursue a civil action, or
27 require as a condition of an agreement that the borrower or
28 applicant limit the authority of the state or any other public agency
29 to investigate and pursue claims alleging violation of law or
30 regulations.

31 (c) A broker, trustee, or mortgagee, or his or her agent,
32 beneficiary, or ~~assign~~ *assigns* shall not refuse to enter into an
33 agreement with a borrower or an applicant regarding a high-cost
34 loan, subprime loan, or nontraditional mortgage solely because he
35 or she refuses to waive rights, remedies, obligations, or procedures
36 provided for in this section. The exercise by a borrower or applicant
37 of the right to refuse to waive legal rights, remedies, obligations,
38 or procedures, including a rejection of an agreement to arbitrate,
39 shall not affect any other term of the agreement.

(d) Any waiver of rights, remedies, obligations, or procedures of California law with respect to a high-cost loan, subprime loan, or nontraditional mortgage by a mortgagor or trustor, or applicant for that loan, shall be knowing and voluntary, and shall not be a condition of the agreement. Any waiver, including an agreement to arbitrate a dispute with respect to that loan, that is required as a condition of the agreement in violation of this section, shall be deemed involuntary, unconscionable, against public policy, and unenforceable.

(e) A broker, trustee, or mortgagee or his or her agent, beneficiary, or assigns has the burden of proving that any waiver of rights, remedies, obligations, or procedures of California law with respect to a high-cost loan, subprime loan, or nontraditional mortgage, including any agreement to arbitrate a claim or dispute, was knowingly and voluntarily made by the borrower or applicant and was not a condition of the agreement. This subdivision shall apply to an agreement to waive any rights, remedies, obligations, and procedures of California law with respect to those loans, including an agreement to arbitrate, that is entered into, altered, modified, renewed, or extended on or after January 1, 2009.

(f) For purposes of this section, the following definitions shall apply:

(1) "Creditor" has the same meaning as "lender" as defined in Section 3500.2 of Title 12 of the Code of Federal Regulations and includes a mortgage broker.

~~(2) "High-cost loan" means a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and where one of the following conditions is met:~~

~~(A) For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than 8 percentage points for first lien loans, or by more than 10 percentage points for subordinate lien loans, the yield on treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.~~

1 ~~(B) The total points and fees payable by the consumer at or~~
2 ~~before closing for a mortgage or deed of trust will exceed 5 percent~~
3 ~~of the total loan amount.~~

4 (2) “High-cost loan” has the same meaning as set forth in
5 Section 4970 of the Financial Code.

6 (3) “Subprime loan” or “subprime mortgage” means a loan
7 secured by a dwelling that is, or will be, the consumer’s principal
8 dwelling and in which the annual percentage rate exceeds the
9 greater of either of the following:

10 (A) If the loan is a closed-end loan, the difference between the
11 annual percentage rate for the loan and the yield on treasury
12 securities having comparable periods of maturity is either equal
13 to or greater than (i) 3 percentage points if the loan is secured by
14 a first lien mortgage or deed of trust or (ii) 5 percentage points if
15 the loan is secured by a subordinate lien mortgage or deed of trust.
16 If the loan is an open-end credit plan, the difference between the
17 annual percentage rate for the loan and the yield on treasury
18 securities having comparable periods of maturity is equal to or
19 greater than 3 percentage points, regardless of whether the
20 open-end credit plan is secured by a first or subordinate lien
21 mortgage or deed of trust. Without regard to whether the loan is
22 subject to or reportable under the provisions of the federal Home
23 Mortgage Disclosure Act (HMDA) (12 U.S.C. Sec. 2801 et seq.),
24 the difference between the annual percentage rate and the yield on
25 treasury securities having comparable periods of maturity shall be
26 determined using the same procedures and calculation methods
27 applicable to loans that are subject to the reporting requirements
28 of the HMDA.

29 (B) The difference between the annual percentage rate for the
30 loan and the annual yield on conventional mortgages published
31 by the Board of Governors of the Federal Reserve System, as
32 published in the Federal Reserve Statistical Release (H.15) or any
33 publication that may supersede it, is either equal to or greater than
34 (i) 1.75 percentage points, if the loan is secured by a first lien
35 mortgage or deed of trust or (ii) 3.75 percentage points, if the loan
36 is secured by a subordinate lien mortgage or deed of trust.

37 (4) “Nontraditional loan” or “nontraditional mortgage” means
38 a mortgage product that allows a consumer to defer payment of
39 principal and, sometimes, interest, as set forth in the “Interagency

Guidance on Nontraditional Mortgage Product Risks” (71 Fed. Reg. 58609 (Oct. 4, 2006)).

(5) “Points and fees” shall include the following:

(A) All items included in the definition of finance charge in Sections 226.4 (a) and 226.4 (b) of Title 12 of the Code of Federal Regulations, except interest or the time price differential.

(B) All items described in Section 226.32(b)(1)(iii) of Title 12 of the Code of Federal Regulations.

(C) All compensation paid directly or indirectly to a mortgage broker from any source, including, but not limited to, any payment of a yield spread premium, and including a payment to a mortgage broker that originates a loan in its own name in a table-funded transaction.

(D) The cost of all premiums financed by the creditor directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid in full on a monthly basis shall not be considered financed by the creditor.

(E) The maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents.

(F) All prepayment fees or penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same creditor or an affiliate of the creditor.

(G) For open-end loans, the points and fees are calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the loan documents, plus the minimum additional fees the consumer would be required to pay to draw down an amount equal to the total credit line.

(6) “Points and fees” shall not include the following:

(A) Taxes, filing fees, recording fees, and other charges and fees paid or to be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

(B) Bona fide and reasonable fees paid to a person other than the creditor or an affiliate of the creditor for fees for tax payment services, flood certification, pest infestation and flood

determination, appraisal fees, fees for inspections performed prior to closing, credit report fees, survey fees, attorney's fees if the consumer has the right to select the attorney from an approved list or otherwise, notary fees, escrow charges, so long as not otherwise included in the definition of finance charge in subparagraph (A) of paragraph (5), title insurance premiums, and fire and hazard insurance and flood insurance premiums, provided that the conditions in Section 226.4(d)(2) of Title 12 of the Code of Federal Regulations are met.

SEC. 3. Section 1281 of the Code of Civil Procedure is amended to read:

1281. (a) Except as provided in subdivision (b), a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, except upon those grounds that exist for the revocation of any contract.

(b) Subdivision (a) does not apply to any arbitration agreement that is involuntary, unconscionable, against public policy, or otherwise unenforceable.

SEC. 4. Section 4979.8 of the Financial Code is repealed.

SEC. 5. Section 4979.8 is added to the Financial Code, to read:

~~4979.8. (a) Notwithstanding any other provision of law, a consumer may assert against any subsequent holder or assignee of a high-cost loan all claims and defenses that the consumer could assert against the creditor who originated the loan for violations of subdivisions (a) to (f), inclusive, of, subdivisions (i) and (k) of, and subdivisions (l) to (p), inclusive, of, Section 4973, as proposed to be amended by AB 1830 of the 2007–08 Regular Session.~~

~~(b) Notwithstanding any other provision of law, a consumer may assert against any subsequent holder or assignee of a subprime loan or nontraditional mortgage all claims and defenses that the consumer could assert against the creditor who originated the loan for violations of subdivisions (a) to (c), inclusive, of, subdivisions (e) to (h), inclusive, of, subdivisions (j) to (l), inclusive, of, and subdivisions (n) and (o) of, Section 4973.2, as proposed to be added by AB 1830 of the 2007–08 Regular Session.~~

~~(c) Notwithstanding any other provision of law, a consumer may assert against any subsequent holder or assignee of a high-cost loan, subprime loan, or nontraditional mortgage all claims and defenses that the consumer could assert against a broker for~~

1 violations of subdivisions (b) to (e), inclusive, of Section 10133.25
2 of the Business and Professions Code, for violations of subdivisions
3 (b) to (e), inclusive, of Section 22168, and for violations of
4 subdivisions (b) to (e), inclusive, of Section 50513, as those
5 sections are proposed to be added by AB 2880 of the 2007-08
6 Regular Session.

7 (d) A subsequent holder or assignee's liability under
8 subdivisions (a), (b), and (c) shall be limited to amounts required
9 to reduce or extinguish the consumer's liability under the loan,
10 plus any additional amounts required to recover costs and
11 disbursements, including reasonable attorney's fees and costs.

12 (e) For purposes of this section, the term "creditor" has the same
13 meaning as "lender," as defined in Section 3500.2 of Title 12 of
14 the Code of Federal Regulations and includes a mortgage broker.

15 4979.8. (a) Notwithstanding any other provision of law, any
16 person who purchases or is otherwise assigned a high-cost loan
17 shall be subject to all affirmative claims and any defenses with
18 respect to the loan that the borrower could assert against the
19 original creditor or broker of the loan, provided that this
20 subdivision shall not apply if the purchaser or assignee
21 demonstrates, by a preponderance of the evidence, that a
22 reasonable person exercising reasonable due diligence could not
23 determine that the mortgage was a high-cost loan.

24 (b) It shall be presumed that a purchaser or assignee has
25 exercised due diligence if the purchaser or assignee demonstrates
26 by a preponderance of the evidence that it does all of the following:

27 (1) Has in place at the time of the purchase or assignment of
28 the loan, policies that expressly prohibit its purchase or acceptance
29 of assignment of any high-cost loan.

30 (2) Requires by contract that a seller or assignor of consumer
31 loans to the purchaser or assignee represents and warrants to the
32 purchaser or assignee either of the following:

33 (A) That it will not sell or assign any high-cost home loan to
34 the purchaser or assignee.

35 (B) That the seller or assignor is a beneficiary of a
36 representation and warranty from a previous seller or assignor
37 to that effect.

38 (3) Exercises reasonable due diligence at the time of purchase
39 or assignment of consumer loans or within a reasonable period
40 of time thereafter intended by the purchaser or assignee to prevent

1 *the purchaser or assignee from purchasing or taking assignment*
2 *of any high-cost loan.*

3 *(c) Notwithstanding any other law to the contrary, but limited*
4 *to amounts required to reduce or extinguish the borrower's liability*
5 *under the loan plus amounts required to recover costs, including*
6 *reasonable attorney's fees, a borrower acting only in an individual*
7 *capacity may assert the following against the creditor or any*
8 *subsequent holder or assignee of the loan:*

9 *(1) Within six years of the closing of a high-cost loan, a claim*
10 *for a violation of this section in connection with the loan as an*
11 *original action.*

12 *(2) At any time during the term of a high-cost loan, after an*
13 *action to collect on the high-cost loan or an action to foreclose on*
14 *the collateral securing the high-cost loan has been initiated or the*
15 *debt arising from the high-cost loan has been accelerated or the*
16 *high-cost loan has become 60 days in default, any defense, claim,*
17 *or counterclaim.*

18 *(d) It is a violation of this section, for the purposes of subdivision*
19 *(c), for any person, in bad faith, to attempt to avoid the application*
20 *of this section by doing any of the following:*

21 *(1) Dividing any loan transaction into separate parts.*

22 *(2) Engaging in any other such subterfuge, with the intent of*
23 *evading the provisions of this section.*

24 *(e) Nothing in this section shall be construed to limit the*
25 *substantive rights, remedies, or procedural rights, including, but*
26 *not limited to, recoupment rights under the common law, available*
27 *to a borrower against any creditor, assignee, or holder under any*
28 *other law. The limitations on assignee liability in subdivision (c)*
29 *shall not apply to the assignee liability in subdivision (b), (d), or*
30 *(e).*

31 *(f) (1) A creditor in a high-cost loan who, when acting in good*
32 *faith, fails to comply with the provisions of this section, shall not*
33 *be deemed to have violated this section if the creditor establishes*
34 *either of the following:*

35 *(A) Within 45 days of the loan closing, the creditor has made*
36 *appropriate restitution to the borrower, and appropriate*
37 *adjustments are made to the loan.*

38 *(B) Within 365 days of the loan closing and prior to receiving*
39 *any notice from the borrower of the compliance failure, if the*
40 *compliance failure was not intentional and resulted from a bona*

1 *bona fide error notwithstanding the maintenance of procedures*
2 *reasonably adopted to avoid those errors, the borrower is notified*
3 *of the compliance failure, appropriate restitution is made to the*
4 *borrower, and appropriate adjustments are made to the loan.*

5 *(2) For purposes of subparagraph (B) of paragraph (1),*
6 *examples of bona fide errors include clerical, calculation, computer*
7 *malfunction and programming, and printing errors. An error of*
8 *legal judgment with respect to a person's obligations under this*
9 *section is not a bona fide error.*

10 *(g) The remedies provided in this section are cumulative.*

11 *(h) For purposes of this section, "high-cost loan" has the same*
12 *meaning as defined in Section 4970.*